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Westchester Capital Management, Inc. and
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IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

HCL PARTNERS LIMITED PARTNERSHIP, On behalf of Itself and all others similarly situated,

Plaintiff,

-v-

LEAP WIRELESS INTERNATIONAL, INC., S. DOUGLAS HUTCHESON, DEAN M. LUVISA, AMIN I. KHALIFA and PRICEWATERHOUSECOOPERS, LLP,

Defendants.

FRANK CHAREK, Individually and on behalf of all others similarly situated,

Plaintiff,

-v-

LEAP WIRELESS INTERNATIONAL, INC., S. DOUGLAS HUTCHESON, MARK H. RACHESKY, AMIN I. KHALIFA, GLENN UMETSU, and DEAN M. LUVISA,

Defendants.

[Caption continued on next page]

Case No.: 07-cv-2245-BTM-NLS

CLASS ACTION

REPLY BRIEF IN FURTHER SUPPORT OF MOTION BY CLASS MEMBERS WESTCHESTER CAPITAL MANAGEMENT, INC. AND GREEN & SMITH INVESTMENT MANAGEMENT L.L.C. FOR APPOINTMENT AS LEAD PLAINTIFF

DATE: March 28, 2008
TIME: 11:00 a.m.
JUDGE: Hon. Barry Ted Moskowitz
CTRM: 15 (5th Floor)

Case No.: 07-cv-2256-BTM-NLS

DEVAY CAMPBELL, Individually and on behalf of all others similarly situated, Plaintiff, -v- LEAP WIRELESS INTERNATIONAL, INC., S. DOUGLAS HUTCHESON, MARK H. RACHESKY, AMIN I. KHALIFA, GLENN UMETSU, and DEAN M. LUVISA, Defendants.	Case No.: 07-cv-2297-BTM-NLS

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The Westchester Movants have suffered approximately $7.5 million in losses in connection with their purchases and sales of the securities of Leap Wireless. Their monetary losses dwarf the losses of the New Jersey Carpenters Pension and Benefits Funds (the "New Jersey Funds"). All other entities, including pension funds like the New Jersey Funds, have withdrawn their motions to be appointed as the lead plaintiffs in recognition of the fact that the Westchester Movants are presumptively the most adequate plaintiffs. Only New Jersey even attempts to assert that the Westchester Movants are not adequate plaintiffs or are atypical. Nowhere in their opposition do the New Jersey Funds even come close to establishing, however, that the claims of the Westchester Movants do not arise from the same set of facts and the same legal theories as do the claims of the other members of the proposed class. Likewise, the New Jersey Funds does not assert that the Westchester Movants have interests that are antagonistic to the interests of the absent class members or that the Westchester Movants have not hired qualified counsel. In other words, nowhere do the New Jersey Funds address the real requirements of Rule 23.

Instead, the New Jersey Funds claim that the Westchester Movants do not have authority to bring this suit, despite the sworn statement of the Chief Compliance Officer of the Westchester Movants and case law that unequivocally provides otherwise. The New Jersey Movants ask the Court to disregard the sworn statement of Roy Behren establishing that the Westchester Movants have the authority and the legal right to sue, and instead to accept their unsupported assertions based on speculation and a misunderstanding of the law. For the reasons set forth below, the Court should appoint the Westchester Movants, who have the largest losses by far and have made a preliminary showing that they satisfy Rule 23, as the Lead Plaintiff.

I. THE WESTCHESTER MOVANTS HAVE STANDING AND AUTHORITY TO PURSUE THIS LAWSUIT

The certification signed by Roy Behren, the Chief Compliance Officer for the Westchester Movants, affirms that Westchester Capital and G&S have full discretion and control all investments made by the funds they advise. Mr. Behren's sworn statement establishes that the Westchester Movants: (1) have complete authority to manage assets on behalf of clients and take legal action arising from the management of such assets; (2) have complete investment authority over trades made in the funds they advise; and (3) are agents and attorneys-in-fact with full power and authority to act in connection with investments made by the funds.

A multitude of courts have specifically held that where an investment adviser declares that it has full and compete discretion and authority to manage the securities of its clients, including the authority to purchase and sell, the investment advisor is deemed to have actually purchased the shares for the purposes of standing under *Blue Chips Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975). *See Alfaro v. CapRock Commc'n Corp.*, No. 3:00-CV-1613-R, 2000 U.S. Dist. LEXIS 21743, at *7-*8 (N.D. Tex. Dec. 8. 2000) ("rule in Blue Chip Stamps is not meant to exclude institutional investors and money managers, but rather should be interpreted broadly to include them as they are often the parties who make the investment decisions").[1]

Similarly, the clear majority of courts that have ruled on this issue have held that a proposed lead plaintiff's purchases of securities on behalf of clients does not prevent it from being appointed lead plaintiff. *See Takeda v. Turbodyne Techs., Inc.*, 67 F. Supp. 2d 1129, 1136 n.18 (C.D. Cal. 1999) (noting that because "the Congressional preference was for large, institutional investors" to act as lead plaintiff, the proposed lead plaintiff's status as an investment advisor with losses incurred on behalf of its investments clients did not "detract[] from [the investment advisor's] suitability as a lead plaintiff"); *Casden v. HPL Techs., Inc.*, No. C-02-3510 VRW, 2003

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[1] *See also Weinberg v. Atlas Air Worldwide Holdings, Inc.*, 216 F.R.D. 248, 255 (S.D.N.Y. 2003) ("[W]hen the investment advisor is also the attorney-in-fact for its clients with unrestricted decision making authority, the investment advisor is considered the 'purchaser' under the federal securities laws with standing to sue in its own name."); *In re eSPEED, Inc. Sec. Litig.*, 232 F.R.D. 95, 98 (S.D.N.Y. 2005) ("for an investment advisor to attain standing on behalf of investors . . . the advisor must be the attorney in fact for his clients, and he must be granted both unrestricted decision-making authority and the specific right to recover on behalf of his clients"); *Olsen v. New York Cmty. Bancorp, Inc.*, 233 F.R.D. 101, 108 (E.D.N.Y. 2005); *In re DaimlerChrylser AG Sec. Litig.*, 216 F.R.D 291, 299 (D. Del. 2003) (same). Ignoring this entire line of cases, the New Jersey Funds rely heavily on an unpublished opinion that summarily denied class representative status to an investment manager without addressing this line of cases. *In re Tyco Int'l Ltd.*, 236 F.R.D. 62, 72-73 (D.N.H. 2006). Cases decided after *Tyco* consider the *Tyco* case an anomaly. *See In re Sonus Network, Inc. Sec. Litig.*, No. 04-10294-DPW, 2007 U.S. Dist. LEXIS 71031, at *24-*27 (D. Mass. Sept. 25, 2007) (calling *Tyco* an outlier and stating that the *Tyco* court formulated an "overbroad" rule that was not premised on the "nuanced analysis" required by Article III).

U.S. Dist. LEXIS 19606 (N.D. Cal. Sept. 29, 2003) (finding investment advisor with complete investment discretion qualified to serve as lead plaintiff).

As explained by the court in *In re Unumprovident Corp. Sec. Litig.*, Case No. 1:03-CV-049, 2003 U.S. Dist. LEXIS 24633 (E.D. Tenn. Nov. 6, 2003):

> Some courts considering this question have limited investment manager standing in securities fraud cases to situations where the adviser or manager holds unrestricted decision-making authority to purchase stock on behalf of its clients *and* is also the attorney-in-fact for its clients. Even under this narrower approach, the Court finds Glickenhaus has provided sufficient evidence to support the conclusion it has standing to assert the claims common to the class Glickenhaus has provided a sworn declaration from its general partner, James Glickenhaus, stating it "has complete investment discretion in choosing securities to purchase for the benefit of its clients" and is "attorney-in-fact for all [its] clients and [is] authorized to bring suit on behalf of [its] clients." Glickenhaus need not provide the Court with copies of all its contracts to meet its burden, rather the Louisiana Funds must affirmatively prove Glickenhaus does not have standing.

Id. at *29-*31 (citations omitted and emphasis in original).

The certification of Roy Behren submitted with his original motion is incontrovertible evidence of Westchester Capital and G&S's unrestricted decision making authority and authority to bring this suit to recover the losses suffered by the funds that they manage. Mr. Behren's certification stated that Westchester Capital and G&S have full discretion and control over the investments of the funds and therefore are authorized to undertake all acts to recover losses suffered by those funds, including commencing legal action and seeking to be appointed as the lead plaintiff. This certification is sufficient to establish the presumption that Westchester Capital and G&S have the authority and standing to sue and are therefore the most adequate lead plaintiff to lead this litigation. As if this were not enough, Mr. Behren has provided a sworn declaration, submitted with this reply, confirming that which was set out in his certification.[2]

Under the circumstances, the New Jersey Funds must prove that, in essence, Mr. Behren is somehow mistaken and that the Westchester Movants do not have standing. The New Jersey

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[2] A declaration of this nature is sufficient to establish authority to bring suit to recover losses on behalf of funds. *See, e.g., Weinberg*, 216 F.R.D. at 255; *Ezra Charitable Trust v. Rent-Way, Inc.*, 136 F. Supp. 2d 435, 441 (W.D. Pa. 2001); *Olson*, 233 F.R.D. at 107.

Movants make no such showing and instead make assumptions and errors based upon a fundamental misunderstanding of the case law cited above. The New Jersey Funds do not seem to take issue with the authority of Mr. Behren to act on behalf of the Westchester Movants. Rather, the New Jersey Funds characterize the conclusion that Mr. Behren has the authority to act on behalf of the underlying funds as "an enormous leap of faith." New Jersey Funds' Memorandum in Opposition ("MIO") at 8. This argument misses the point. The cases cited above establish that, when an investment advisor has been given and complete discretion, the adviser itself has standing to sue and to act as a lead plaintiff. The effort of the New Jersey Funds to find specific authority or an assignment of rights in fund documents is nothing more than a red herring because the rights of the Westchester Movants are established by the case law. However, even if one were to consider the very documents that the New Jersey Funds cite, these documents confirm that Westchester Capital decides which securities shall be purchased by The Merger Fund. MIO at 9 (citing to the Investment Advisory Contract between The Merger Fund and Westchester Capital). The same is true with respect to The Merger Fund VL. MIO at 10. If anything, these documents, which grant the authority to Westchester Capital to advise and manage the funds, confirm what Mr. Behren has sworn to in his certification and declaration. Mr. Behren is Chief Compliance Officer of the Westchester Movants and the law discussed above confers upon the Westchester Movants standing to sue in their own right and the right to seek to be appointed as the Lead Plaintiff.

Not only do the documents undermine the position of the New Jersey Funds, but so do the cases they cite. Indeed, none stand for the proposition that the mere status as an investment advisor precludes lead plaintiff appointment. In *In re Turkcell Iletisim Hizmetler A.S. Sec. Litig.*, 209 F.R.D. 353, 357 (S.D.N.Y. 2002), the court noted, "[t]he fact that BPI [an investment advisor] is an institutional investor does not itself preclude it from being a lead plaintiff." The New Jersey Funds also rely on *Smith v. Suprema Specialties, Inc.*, 206 F. Supp. 2d 627, 634-35 (D.N.J. 2002), yet *Suprema* actually supports the Westchester Movants' position. In that case, Judge Walls intentionally focused on the "proper authorization issue" in the context of an investment advisor seeking appointment as lead plaintiff noting that "where a court appoints an asset manager as lead plaintiff, the plaintiff should provide evidence that it 'acts as attorney-in-fact for its clients and is authorized to bring suit to recover for, among other things, investment losses.'" *Id.* at 634. Significantly, three months later Judge Walls in *Roth v. Knight Trading Group., Inc.*, 228 F. Supp. 2d 524, 529 (D.N.J. 2002) wrote another opinion in which he appointed an investment advisor as lead plaintiff. In *Roth*, Judge Walls specifically distinguished his opinion in *Smith*, stating:

> PAM is an investment advisor who seeks to be named Lead Plaintiff. This Court previously refused to name an investment advisor as lead plaintiff because the investment advisor was unable to demonstrate that it functioned as a single investor and was authorized to act on behalf of its clients. However, PAM. [sic] has demonstrated to the Court's satisfaction that it has complete investment authority over its trades, and is agent and attorney-in-fact with full power and authority to act in connections with its investments. Because PAM has 'unrestricted decision-making authority,' PAM's status as an investment advisor does not prevent it from serving as lead plaintiff.

Id. at 529-30 (citations omitted).

Similarly, the other cases to which the New Jersey Funds cite do not establish a per se rule that investment advisors cannot be lead plaintiffs, but rather, in each of those cases, the proposed lead plaintiff fell short for reasons that are not at issue here. In *In re Peregrine Sys. Sec. Litig.*, Civ. No. 02-CV-870-J, 2002 U.S. Dist. LEXIS 27690, at *56-*57 (S.D. Cal. Oct. 11, 2002), the proposed lead plaintiff was not able to state that it had authority to institute suit, had purchased shares for a variety of clients that it refused to identify and failed to establish that its clients were related to each other in any way. In *Weisz v. Calpine Corp.*, Civ. No. 02-1200, 2002 U.S. Dist. LEXIS 27831, at *21-*22 (N.D. Cal. Aug. 19, 2002), the proposed lead plaintiff failed to provide any information demonstrating that it had coordinated and selected the investments of its clients as opposed to merely executed orders from it clients and failed to provided a declaration, as has been provided here, stating that it had authority to sue. The *Weisz* court went on to cite to cases holding that an investment advisor *may* act as a lead plaintiff where it submits a sworn declaration stating that it has investment discretion and authority to sue. *Id.* at *23-*24.[3]

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[3] *See also In re Cardinal Health, Inc. Sec. Litig.*, 226 F.R.D. 298, 311 (S.D. Ohio 2005) (proposed lead plaintiff failed to submit declaration confirming status as attorney-in-fact); *eSPEED*, 232 F.R.D. at 98 (rejecting lead plaintiff for failure to establish decision making authority and right to recover).

Mr. Behren's sworn certification and sworn declaration are the best evidence of the rights of the Westchester Movants vis-à-vis the five related funds that they manage. Mr. Behren has submitted a declaration establishing that the Westchester Movants have unrestricted investment decision-making authority with respect to the funds that invested in Leap and that, as Chief Compliance Officer, he has the authority to commence legal action and take other steps to recover losses as attorney-in-fact. The documents submitted by the New Jersey Funds confirm this. The Court should not countenance the efforts of the New Jersey Funds to distort what is a clear record in their effort to displace the Westchester Movants whose losses in Leap securities dwarf those of the New Jersey Funds.

II. THE TRADING STRATEGIES OF THE WESTCHESTER MOVANTS DO NOT RENDER THEM ATYPICAL OR SUBJECT TO UNIQUE DEFENSES

Courts have repeatedly rejected the assertion that the trading strategies of a proposed lead plaintiff can render it atypical or subject to unique defenses for the purposes of a Rule 23 analysis. While the New Jersey Funds never specifically say why they believe that utilizing a merger arbitrage investing strategy should disqualify the Westchester Movants from acting as a lead plaintiff, courts universally recognize that investors who utilize sophisticated trading strategies rely on the integrity of the market in the same manner as all other investors. The fact that purchasers of stock have different motivations is not legally relevant for purposes of Rule 23. As one court aptly put it:

> It can be stated without fear of gainsay that the shareholders of every large, publicly traded corporation includes institutional investors, short-sellers, arbitragers, etc. The fact that those traders have divergent motivations in purchasing shares should not defeat the fraud-on-the-market presumption absent convincing proof that price played *no* part whatsoever in their decision making.

Moskowitz v. Lopp, 128 F.R.D. 624, 631 (E.D. Pa. 1989) (emphasis in original) (rejecting argument that plaintiff involved in "takeover arbitrage" is atypical). The fact that a person trades in securities, anticipating that they will either rise or fall, does not preclude reliance on the market and market price. Similarly, in *In re Unioil Sec. Litig.*, 107 F.R.D. 615 (C.D. Cal. 1985) the defendants argued that the named plaintiffs had interests adverse to short-sellers, market makers, and ins-and-outs. The Court observed that any differences between the named plaintiffs and class members, as either relating to damages or to individual issues of reliance, would not preclude class certification. *Id*. at 622. The court refused to limit the class so as to exclude any of these investors. *Id*.[4]

Nor does any claimed disparity in decision-making methods or abilities to analyze market conditions preclude the satisfaction of all elements of Rule 23. *Leist v. Tamco Enters., Inc.*, No. 80 Civ. 4439-CLB, 1982 U.S. Dist. LEXIS 17389, at *7 (S.D.N.Y. Mar. 16, 1982). In *Leist*, the defendants argued that the class was comprised of "relatively unsophisticated" investors, whereas the proposed plaintiffs were professional stock and commodities traders engaged in full-time trading. *Id*. at *6. In concluding that these claimed "differences" between plaintiffs and the class members did not preclude class certification, the *Leist* court observed:

> This disparity in methods of decision-making and abilities to analyze market conditions does not, in my view, prevent plaintiff's claims from being regarded as typical. Plaintiff, as a professional investor, the class members as amateurs, and indeed, those who choose stock by means of a ouija board or by throwing darts at the list, all believe as an article of faith that the market is an honest market, representing the sum total of the effects on price, supply and demand of shares, of all public information. *Where the public market of a quoted security is polluted by false information, or where price, supply and demand are distorted as a result of misleading omissions, all types of investors are injured, experienced and inexperienced, smart and stupid.*

Id. at *7 (emphasis added).[5]

The trading strategies of the Westchester Movants do not render them atypical or inadequate class representatives and therefore do not render them incapable of acting as Lead Plaintiff. None of the cases cited by the New Jersey Funds reject a proposed Lead Plaintiff solely because that entity purchased shares in anticipation of a corporate transaction. In *Smajlaj v. Brocade Commc'n Sys. Inc.*, No. C 05-02042 CRD (N.D. Cal. Jan. 12, 2006) (MIO, Ex. 8), cited by the New Jersey Funds, Judge Breyer was presented with specific facts that troubled him regarding one of the movants including a reluctance to turn over documents, the refusal of one of two investment advisers to move to be lead plaintiff, the inability to ascertain which funds actually purchased the stock in question and a host of other questions. *Smajlaj*, slip op. at 4. Here, Mr. Behren is the Chief Compliance Officer for both advisers that comprise the Westchester Movants, both advisers have moved to be appointed as the Lead Plaintiff and the trades of each of the underlying funds have been set out in Mr. Behren's certification. Mr. Behren is currently acting in the same capacity on behalf of the Westchester Movants in a case pending in the Southern District of New York and there have been no issues with Mr. Behren's standing or authority to pursue the claims asserted. Thus, the concerns of the *Brocade* court are not present here.

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[4] *See also DaimlerChrylser,* 216 F.R.D. at 198-99 (rejecting claim that investment strategies render a plaintiff atypical for purposes of class certification); *Tyson*, 2003 U.S. Dist. LEXIS 17904 (appointing group of arbitrageurs as class representatives in securities fraud litigation).

[5] *See also In re Select Comfort Corp. Sec. Litig.*, 202 F.R.D. 598, 607 n.12 (D. Minn. 2001) (finding that "distinctive trading strategies" do not render class members atypical).

In *In re Bank One S'holders Class Actions*, 96 F. Supp. 2d 780 (N.D. Ill. 2000), also relied upon by the New Jersey Funds, the proposed lead plaintiff was a short seller. *Id*. at 784. The New Jersey Funds recognize this fact in their memorandum but never bother to explain why an investor who purchases shares in anticipation of a merger transaction is at all equivalent to a seller. None of the New Jersey Funds' cases stand for the proposition that an investor who purchases shares in anticipation of a merger transaction is incapable of serving as a lead plaintiff and ultimately as a class representative.

III. THE NEW JERSEY FUNDS' REMAINING ARGUMENTS ARE UNAVAILING

In Section D of their brief, the New Jersey Funds' attempt to discredit the certification signed by Mr. Behren on a number of baseless grounds.

First, the New Jersey Funds assert that the "Investment Advisors failed to represent to the Court that they will testify on behalf of the class in this case." MIO at 14. This argument is absurd. Mr. Behren signed the certification in his capacity as Chief Compliance Officer of the Westchester Movants and as their representative. He has agreed to testify on behalf of the Westchester Movants in this litigation as the authorized agent and most appropriate person to do so. His certification does not preclude others from so testifying if appropriate and, as the litigation progresses, the Westchester Movants will address with the Defendants, the time and manner of any deposition testimony to be provided.

Second, as noted in the opposition brief filed by the Westchester Movants, trading data was provided by the Westchester Movants on an Excel spreadsheet. Some of the cells of the spreadsheet, specifically some cells containing trade dates, did not print completely when Westchester's certification was presented with their initial motion. The reprinted spreadsheet has been provided to the Court and was provided to the New Jersey Funds well before their opposition was due. The printing of the spreadsheet obviously had no bearing on the calculation of damages and there was no "arithmetic error" as the New Jersey Funds suggest. The suggestion that this issue should serve to disqualify the Westchester Movants is overstated at best.[6]

Finally, the New Jersey Funds claim that the losses of the Westchester Movants are "grossly overstated." MIO at 15. Even if these damages were overstated in the manner that the New Jersey Funds incorrectly suggests, the losses of the Westchester Movants would still be greater than those of the New Jersey Funds. The New Jersey Funds first asserts that losses attributable to shares purchased and sold during the class period should be excluded from damage calculations. Most courts that have considered the issue have concluded that in and out purchases are properly included in damages calculations. Courts account for class period sales by focusing on the last-in-first-out method of damage analysis which offsets gains accrued to the plaintiffs due to the inflation of stock prices during the class period. *See eSPEED*, 232 F.R.D. at 101 (noting that courts prefer LIFO and reject FIFO because FIFO ignores sales occurring within the class period and may exaggerates losses).[7]

However, even if you exclude all in-and-out transactions, the losses of the Westchester Movants are still greater than those of the New Jersey Funds. As the New Jersey Funds acknowledges, Westchester sold 62% of their shares during the Class Period but retained 38%. Indeed, the Westchester Movants retained 161,900 shares on the last day of the class period, more shares than the New Jersey Funds purchased during the entire class period. Thus, the losses of the Westchester Movants, even looking at just those 161,900 shares are still the largest.

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[6] In *Singer v. Nicor, Inc.*, Civ. No. 02-5168 (N.D. Ill. Oct. 16, 2002) (MIO, Ex. 9), one of the movants attempted to amend its lead plaintiff motion to increase the amount of its losses. *Singer*, slip op. at 5-6. The court went on to appoint the movant that had amended its motion as the lead plaintiff anyway. *Id.* at 6-8. Counsel for the movant that tried to amend its motion was Schoengold & Sporn, counsel for the New Jersey Funds here.

[7] *See also In re Cable & Wireless, PLC, Sec. Litig.*, 217 F.R.D. 372, 378-79 (E.D. Va. 2003); *Bhojwani v. Pistiolis*, No. 06-Civ.-13761, 2007 U.S. Dist. LEXIS 52139 (S.D.N.Y. June 26, 2007); *In re Bausch & Lomb Inc. Sec. Litig.*, 244 F.R.D. 169, 173 (W.D.N.Y. 2007); *In re Cardinal Health*, 226 F.R.D. 298, 303 (S.D. Ohio 2005); *In re Pfizer Inc. Sec. Litig.*, 233 F.R.D. 334, 338 n.3 (S.D.N.Y. 2005).

Next, the New Jersey Funds claim that the Westchester Movants' damages should be offset by transactions in the securities of MetroPCS, assuming that there even are any such transactions. The New Jersey Funds do not point to a single case or statute supporting this novel theory. Neither the PSLRA nor any case cited by the New Jersey Funds requires that a potential lead plaintiff disclose its trading in securities other than the security that is the subject of the litigation and at no time has a court held that a lead plaintiff's damage calculations should be offset by transaction in other securities.

As established herein, and in the papers previously filed, the Westchester Movants have the largest financial interest in the relief sought and have satisfied the elements of Rule 23 for the purposes of their motion. The New Jersey Funds have not made a showing that the Westchester Movants are inadequate or atypical in any way.

IV. CONCLUSION

For the reasons set forth herein, and in their opening motion, the Westchester Movants respectfully request that the Court: (1) appoint Westchester Capital and G&S as Lead Plaintiff in the consolidated action; and (2) approve the choice of Abbey Spanier Rodd & Abrams, LLP to serve as Lead Counsel and Hulett Harper Stewart LLP to serve as Liaison Counsel.

DATED: March 21, 2008

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